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No. 84-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EMI LIMITED
Petitioner,

VS.

WILLIAM BENNETT, and ERNEST J. DRONENBURG, JR., SUCCESSOR: KENNETH CORY; RICHARD SILBERMAN, and MARY ANN GRAVES, SUCCESSOR; and MARTIN HUFF and GERALD H. GOLDBERG, SUCCESSOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1.a. Whether a parent United Kingdom corporation which has no permanent establishment in the United States, which has no access to the State courts, and which owns an American subsidiary, has standing to sue in the Federal courts for the following relief:

(1) To restrain defendant state tax officials from making further demands on that corporation either directly or through pressure on its American subsidiary, for financial information about its operations in other countries which it cannot provide either because the law of the home country prohibits it or because local records of foreign subsidiaries do not segregate it and make it available to the parent; and

(2) To restrain defendant state tax officials from collecting a tax assessed against the American subsidiary based on the disregard of the parent's separate entity, and on the apportionment of its income to California, all contrary to a treaty, to international law, and to the United States Constitution.

b. Whether the Federal courts can refuse to entertain a case or controversy under International Law and under the Due Process Clauses of the Fifth and Fourteenth Amendments where the State courts provide no remedy and the rights sought to be enforced are created by the United States Constitution, a treaty to which the United States is a party, and International Law.

2. Does international custom recognized and observed by the Federal Government in its own tax system bind the States of the Union or only the Federal Government, in the taxation of nationals of another country?

3. May the State of California burden foreign commerce by extending its combined unitary income formula (hereinafter "combined formula") to a United Kingdom corporation which has foreign commerce with the United States but which does no business in any state of the United States, which does not have a permanent establishment in the United States, which is not subject to taxation by the United States Government under either the Internal Revenue Code or the United States-United Kingdom Income Tax Convention, and where the effect of the State's application of its formula is to apportion income of the non-resident United Kingdom corporation and its non-United States subsidiaries to the American subsidiary for taxation by California where:

a. The entire income of the United Kingdom corporation and of its non-U.S. subsidiaries has already been taxed in full by the United Kingdom and the other host countries, and California allows neither a deduction for those taxes nor a credit for them against its own tax, thus producing multiple taxation of income earned in foreign commerce; and

b. The income of the American subsidiary is swollen by that apportionment far beyond any conceivable earning capacity of its own business; and

c. The apportionment of the combined net income by the three-factor formula of the ratio of California property, payroll and sales to the combined worldwide property, payroll and sales of the United Kingdom parent and its non-U.S. subsidiaries, is made on the basis of estimates, first because the Official Secrets Act of the United Kingdom prohibits the United Kingdom

corporations from revealing some of the information essential to the application of the California formula, and second because the wages paid by the non-U.K. subsidiaries are not reported to the United Kingdom parent and are for years before California made its demand for information and cannot now be assembled; and

d. There is no uniformity between the economic environment in which the American subsidiary operates and those in which the non-U.S. corporations operate, most notably because the wage rates in the United States for the years before the Court were higher than those prevailing in any other country in which the corporations which California would consolidate operate, with the result that *each* factor in the formula is weighted to apportion more net income to California than could be earned in that state by the business conducted in it, such additional income therefore being that properly taxable exclusively by the United Kingdom and the other foreign countries where the businesses are conducted; and

4. Is the Due Process Clause of the Fourteenth Amendment violated by a state tax:

a. Where the businesses of the United Kingdom parent, its non-U.S. subsidiaries, and the American subsidiary which are being combined are not unitary because their businesses consist primarily of making records and tapes in each country of music popular in that country, and the sale of those records and tapes to the residents of that country, but sales of records in

foreign commerce are made by both the U.K. parent and the American subsidiary to customers of their choice, and under a reciprocal matrix exchange agreement both the U.K. parent and the American subsidiary make records of music initially recorded by the other; and

b. Where the effect of the California formula is to tax to the American subsidiary income earned and received exclusively abroad by other corporations from business conducted locally in other countries or in foreign commerce which income California would not have jurisdiction over directly because of the Due Process Clause, of International Law, and of the United States-United Kingdom Income Tax Convention; and

c. Where any income attributable to the parent's contribution of management to its subsidiaries is derived from the United Kingdom, which is the location of the parent's management, and not the United States or California.

5. Does the United States-United Kingdom Income Tax Convention in effect in the years 1968-1974 prohibit a state's apportioning by formula to an American subsidiary some of the income of its United Kingdom parent corporation where under the treaty the United States can neither tax any of the income of the United Kingdom parent to it nor employ a formula to apportion some of the parent's income to the subsidiary to tax?

PARTIES TO THE PROCEEDING BELOW

There is no other party to this proceeding.

Petitioner is presently a wholly owned subsidiary of Thorn-EMI PLC, a United Kingdom corporation owned predominently by residents of that country. Petitioner is not aware that Thorn-EMI PLC has any similar case pending.

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JURISDICTION

The jurisdiction of this Court is invoked under Sections 1254(1) and 2101(c) of Title 28, United States Code. The United States Court of Appeals filed its decision on July 23, 1984. Its opinion is reported in 738 F.2d 994 and is reproduced in Appendix A hereto. The decision of the District Court, Northern District of California, dismissing the case, was entered on October 8, 1982, and is reported in 560 F.Supp. 134, and Notice of Appeal was filed by petitioner on October 21, 1982.

The jurisdiction of the federal court was invoked under Sections 1331 and 2201, Title 28, United States Code. Plaintiff has no judicial remedies available to it in the California courts under California statutes and constitution, and for that reason the Court of Appeals held that the provisions of Section 1341, Title 28, United States Code, do not remove this case from the jurisdiction of the federal courts, and remanded it to the District Court. That decision is reported in 681 F.2d 1107, 1118. Respondent did not petition for certiorari and the first decision has become the law of the case. The District Court again dismissed based on the assertions that petitioner lacks standing to sue, and the federal courts lack jurisdiction of the subject matter. The affirmance was on the first ground.

STATUTES, CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

1. The sections of the Judicial Code involved are Sections 1331 and 2201, Title 28, United States Code. They are set forth verbatim in Appendix B.

2. The sections of the United States Constitution involved are the Commerce Clause (Art. I, Sec. 8, cl. 3), the

Due Process Clause (amendment 14, Sec. 1), the Import-Export Clause (Art. I, Sec. 10, cl. 2), and Amendment V. All are set forth in Appendix C.

3. The United States-United Kingdom Income Tax Convention in effect in the years involved in this case. The text of the relevant provisions is set forth in full in Appendix D.

STATEMENT OF THE CASE

This case is one to restrain defendant California State tax officials from repeatedly demanding information from petitioner or its American subsidiary, Capitol Industries-EMI, Inc., which either petitioner does not have or cannot reveal under the laws of the United Kingdom, and from collecting a tax assessed against petitioner's subsidiary, Capitol Industries-EMI, Inc., on a portion of petitioner's income as determined by them by estimates in the absence of the information. That income is from petitioner's business done exclusively in foreign and local commerce from and in the United Kingdom, and from its subsidiaries' business in Europe, Asia and elsewhere. All this is in violation of International Law, a federal treaty, and the United States Constitution.

Petitioner, EMI Limited, is a corporation formed in the United Kingdom, which owns all or substantially all of the stock of 63 subsidiary corporations, some of which are formed under the laws of the United Kingdom, and others of which are formed under the laws of the various countries in which they operate. They operate in and are formed under the laws of more than 30 countries in Western Europe, North America, the Near East and the Far East of Asia, South America, South Africa, and Australia. Capitol

Industries-EMI, Inc., is one such subsidiary, and has been since petitioner acquired a majority of its stock in 1956. Capitol Industries-EMI, Inc. (hereinafter "Capitol") is formed under the laws of the United States, has its principal office and plant in Hollywood, California, and has other plants in Illinois, Virginia and Connecticut.

Petitioner does not do business in the United States and does not have a permanent establishment in this country. By treaty it is exempt from United States income tax. In its corporate self it does no business outside of the United Kingdom. Petitioner's worldwide subsidiaries make approximately 20% of all of the phonograph records made in the Western world, and own pressing plants located in 13 countries. Three of these plants are in the United States, owned by Capitol. In addition to that type of music business, through subsidiaries operating in several countries but not in the United States, the EMI group of corporations is in the business of retailing phonograph records and pre-recorded tapes, and sheet music.

Subsidiaries of petitioner also operate a variety of other businesses: the manufacture of television cameras, antennae and transmission equipment, and of security devices; the operation of a movie studio at which both television films and films for the theater are made; the operation of movie theaters, bingo parlors, hotels, restaurants, and places of amusement; the manufacture for the government of the United Kingdom and certain governments of NATO of military equipment, much of which employs radar principles pioneered and in some instances invented by petitioner, and the development and production of equipment in the field of medical electronics, the most notable of which

is the invention and patenting of the CAT brain scanner and body scanner. Capitol conducts no business other than the making of phonograph records and pre-recorded tapes, and at times the manufacture and sale of raw tapes for use by other recording companies.

Petitioner operates in foreign commerce between the United Kingdom and the United States. Its subsidiaries sell completed phonograph records to a United States outlet, but not to Capitol. It and its subsidiaries have a matrix exchange agreement with Capitol, modeled closely after one which petitioner had with RCA before petitioner acquired controlling interest in Capitol, under which each party has an option to license a duplicate matrix of recordings made by the other, to make recordings of the music embedded on that matrix and to sell them in their marketing areas. This agreement is entirely reciprocal, giving petitioner precisely the same rights in respect of matrices of music recorded by Capitol as it gives Capitol for matrices made by petitioner. The agreement confers an option right on each party, and does not bind either party to take any of the matrix offerings of the other. The license fees and other amounts paid for the privilege are entirely reciprocal, so that the amounts paid by Capitol to petitioner are the same as the amounts paid by EMI to Capitol, per unit manufactured.

Defendants demanded information of petitioner, threatening it with monetary penalties if it did not reply. Petitioner informed them that it was not within the jurisdiction of California, could not supply some of the information sought because of restrictions of the Official Secrets Act of the United Kingdom, and did not possess other of the

information sought because it was not supplied to petitioner by its non-U.K. subsidiaries. Defendants then made the same request for information of Capitol, with the same threat of penalty, and Capitol informed defendants that it could not supply information about petitioner which it could not get from petitioner. Defendants' staff then compiled figures about petitioner available from public sources in the United States, and assessed a proposed additional tax against Capitol based upon what they believed to be the total net income of petitioner and all of its worldwide subsidiaries, and an apportionment of it to California based upon the ratio which the California property, payroll and sales of Capitol bore to what defendants estimated was the total worldwide property, payroll and sales of petitioner and its subsidiaries. The non-U.K., non-U.S. property and payroll figures were unknown and defendants substituted their estimates. Capitol protested this action, conferences were held by Capitol representatives with defendants and their representatives, and those representatives informed Capitol that defendants would adhere to their position, until such time as Capitol provided the information defendants had sought from petitioner. Petitioner and Capitol both then filed suits in the United States District Court for the Northern District of California against the defendants, to restrain such an assessment against Capitol, and in petitioner's case to restrain defendants from demanding of petitioner, either directly or through Capitol, information it was prohibited by British law from revealing, from lessening the value of property in the United States through the assertion of unconstitutional taxes from Capitol, and from burdening petitioner's foreign commerce with the United States.

Cross-motions for summary judgment were filed, in petitioner's motion supported by extensive affidavits of officers of petitioner and Capitol, and documentary exhibits. While these cases were pending in the United States District Court, defendants' representatives proposed to Capitol's representatives that defendants would change the basis of assessment, to combine Capitol only with petitioner's music business. Capitol's representatives informed defendants' representatives that the information they needed for such a modified combination and apportionment was not available under British law, so the representatives of defendants devised figures based upon assumptions and estimates and employed those in the apportionment formula in substitution for the figures that they had previously used which had represented the entire worldwide business of petitioner and its subsidiaries. The effect was to reduce the deficiency, but a substantial deficiency in excess of $800,000 still remains in issue for the years as determined by defendants, and an unknown but certain amount for later years. A final assessment was made by defendants on that basis. Petitioner has appealed the assessment to the State Board of Equalization, which has taken no action on it. A levy on the assessment cannot be made while that appeal is pending, and it has not been paid.

The District Court rendered summary judgment for defendants, holding that for purposes of Section 1341, petitioner, although not having any judicial remedy in the California courts, must be deemed to have the remedy California law afforded to Capitol. Appeal was taken, and the Court of Appeals held that petitioner had no remedy in the California courts and therefore Section 1341 did not bar it from the federal courts but suggested sua sponte

that on remand the district court examine petitioner's standing to sue. (681 F.2d 1107, 1118) On remand the District Court refused to rule on the merits and again dismissed the case, this time on the grounds that petitioner lacked standing to sue, and that the federal courts lacked jurisdiction of the subject matter, 560 F.Supp. 134. This appeal followed, and the Court of Appeals affirmed the dismissal for lack of standing to sue.

Petitioner contends that it has standing to sue, and that taxing Capitol on an apportioned amount of petitioner's income represents a forbidden burden on foreign commerce and a denial of Due Process, contrary to the Constitution of the United States, to International Law, and to the United States-United Kingdom Income Tax Convention.

Petitioner contends that it is not engaged in a single unitary business with Capitol, and that the income of each can be readily ascertained by the arm's length method used by the United States Government under Section 482 of the Internal Revenue Code, and by all foreign governments.

REASONS FOR GRANTING THE WRIT

1. The decision below announces a novel limitation on standing to sue which is both a denial of due process and contrary to decisions of this Court. It appears also to be contrary to *Alcan Aluminium Ltd. v. Oregon Tax Comm.*, 724 F.2d 1294, 1299 (7th Cir. 1984).

(a) The Court of Appeals has denied an alien parent corporation access to the Federal courts to assert Federal rights, while acknowledging that the corporation has no access to the state courts. It has thus denied all process of

law to such a corporation.[1] This Court should grant the writ to settle whether the Fifth Amendment requires recognition of the standing of a friendly alien corporation without a state court remedy to enforce its federal rights in the federal courts, particularly in the light of this Court's decision in *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). The decision below is contrary to that decision, and the aberration is on an important issue.

(b) The threatened injuries petitioner seeks to prevent[2] are twofold. First; The considerable expense and the serious risk of violating the British Official Secrets Act which would result from its acceding to defendants' demands. These demands are that it supply the dollar equivalent of the property, payroll and sales and of the California version of net income of its 28 British and 35 off-shore subsidiaries, which in the case of the latter it does not possess and most of them do not either, and that it supply defendants with property and payroll figures for British factories which are engaged in both defense and music work and are "assessed" by the British Ministry with secrecy requirements under the Official Secrets Act. Second; The loss in the value of its American property defendants' as-

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[1]This case is ripe, and the appellate court recognized the fact. (Op. footnote 1.) Defendants have made a final assessment, unlike the facts in some other cases which this Court recently refused to review. *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593 (9th Cir. 1983) *cert. den.* . . . U.S. . . . , 78 L.Ed.2d 717, and *Alcan Aluminium, Ltd. v. Franchise Tax Bd.*, 558 F.Supp. 624 (S.D.N.Y. 1983), aff'd mem. 2d Cir., *cert. den.* . . . U.S. . . . , 79 L.Ed.2d 170. *Alcan Aluminium Ltd. v. Ore. Tax. Comm.*, 724 F.2d 1294, 1299 (7th Cir. 1984) decided that case was unripe, but indicated the parent would have standing to sue when that condition was corrected.

[2]This is a suit for an injunction and declaratory relief.

sessment will produce because it will tax petitioner's subsidiary on some of petitioner's income, which the subsidiary does not own and which does not augment its assets; defendants have estimated the California proportion of the "unitary" income because petitioner has not supplied defendants through Capitol with the information involved in the first injury, and have made an assessment based on those estimates.

The first type of injury confers standing to sue. *United States Steel Corp. v. Multi-State Tax Commission,* 367 F.Supp. 107 (S.D. N.Y. 1973), *aff'd. sub silentio on this point,* 434 U.S. 452. The appellate court chose to turn a blind eye to the continuing nature of the injury and dismissed it because the recent demands had been made against Capitol. Everyone involved knows that Capitol does not possess the information and must obtain it from petitioner, so defendants' demand is in reality that petitioner supply it, on pain of having the value of its American investment reduced. To obtain it petitioner must incur large expense, if obtaining it proves possible, and risk violation of British law petitioner is specifically "assessed" with observing. The appellate court characterized petitioner's refusal as "recalcitrance" (Op. p. 6) which is a remarkably hostile characterization of a refusal to violate British law. It is petitioner's own very real financial and legal injuries it seeks to prevent by its suit. The writ should be granted to permit this Court to remove what evidently is uncertainty that these are hazards which a party has standing to prevent.

(2) The threatened loss of value of petitioner's investment was dismissed below on the ground that a majority

shareholder has no standing to sue to prevent an injury to its controlled corporation. In this, the Court of Appeals has applied a doctrine which appears to be supported principally by its own prior decisions in turn derived from California Supreme Court decisions, in a manner which (a) denies all recourse to American courts by an alien parent corporation seeking to protect itself against financial injury and against demands that it violate the laws of its home country, (b) conflicts with decisions of this Court, (c) cynically insists on a rigid adherence to the corporate entity against petitioner when the burden of petitioner's case is that the defendant state officials are unlawfully disregarding petitioner's corporate entity, and (d) creates a class of economic loss without a remedy. The court tried to turn this argument around and use it against petitioner (Op. p. 8), but no words can obscure the fact that defendants are disregarding petitioner's corporate entity by treating Capitol as the owner of petitioner's income and assets and petitioner's suit is to force them to cease and to recognize that it is petitioner which owns them.

In addition to relying on its own prior decisions, the appellate court cited *Warth v. Seldin*, 422 U.S. 490 (1975) for the proposition that a litigant has no standing to sue to enforce the rights of third parties. The proposition is not novel and has been applied for years (viz. *Heald v. Dist. of Col.*, 259 U.S. 114 (1922)), but neither is it either inflexible or unvarying. In *Barrows v. Jackson*, 346 U.S. 249, 255-257 (1953) it was discussed at length and was called a rule of practice, not a constitutional limitation, and hence an exception to it was made to prevent "a denial of constitutional rights (because) it would be difficult if not impossible for the persons whose rights are asserted to

present their grievance before any court." (346 U.S. at 257.) That is the situation here, if the case is viewed as the court below viewed it, as one in which the legal rights petitioner is asserting are those of its subsidiary. We are uncertain whether the American subsidiary can assert rights against a state tax under either international law (custom) or the U.S.—U.K. treaty. Cf. *Sumitomo Skoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982). Petitioner can do so, however, and there should be no question about its having standing to be a party.

Petitioner is asserting its own rights, which defendants are violating by using its subsidiary as an instrument of execution and force to obtain by indirection what they cannot obtain directly, viz., access to petitioner's records and income.

Moreover, the decision below ignores the fact that corporate stock is property, and this Court has held that neighboring landowners have standing to sue to prevent a consequential loss of value of their property (*Duke Power Co. v. Carolina Env. Study Grp.,* 438 U.S. 59, 73-81 (1978)); and a party even has standing to sue to enjoin the irrigation of land in which he has no present interest but which he hopes to be able to buy if the land becomes cheaper because water is cut off (*Bryant v. Yellen,* 447 U.S. 352 (1980)). The Court of Appeals seems to believe corporate stock is not property, but there cannot be a distinction between the standing of the owner of intangible property and that of a landowner to sue to protect the value of his property.

It is not even necessary to have a present or contingent property right in land in order to have standing to sue to prevent its being made unsuitable for hiking, camping and

fishing. *Duke Power Co. v. Carolina Env. Study Gp., supra,* 438 U.S. 59, 73-74 (1978); *United States v. SCRAP,* 412 U.S. 669, 685, 688 (1973).

Indeed, an economic stake not amounting to a property right can confer standing to sue on a stock exchange, both for its own injuries and those of its members. (*Boston Stock Exchange v. State Tax Comm.,* 429 U.S. 318, 320, n. 3 (1977)). Petitioner has an economic stake in not being put to the expense of formulating information not obtainable from its foreign subsidiaries, and in not being put to the hazard of fines and other penalties for violation of the Official Secrets Act.

Petitioner has a further economic stake in preventing the value of its Capitol stock being reduced through the taxation of Capitol on income it does not have, and the consequent reduction of its assets.[3] The writ should be granted so this court may remove the uncertainty which apparently exists that economic stakes such as these confer standing to sue.

(b) The appellate court held, contrary to numerous decisions of this Court, that petitioner had no standing to sue because the court thought some of its arguments on

[3]The tests of standing to sue are whether the party can obtain relief from the defendant sufficient to redress or prevent the wrong, and whether the complaining party has sufficient stake in the outcome to assure that the court will have the benefit of the party's full dedication to developing the facts and law. *Baker v. Carr,* 369 U.S. 186 (1962); *Duke Power Co. v. Carolina Env. S. Grp.,* supra. There can be no serious question about the former, and any question about the latter should be dissolved by petitioner's assiduous pressing of its cause through two previous petitions for certiorari, four briefs in the Court of Appeals, an equal number in the District Court and two or more oral arguments in each of these courts.

the merits were unsound. In *Bryant v. Yellen, supra,* 447 U.S. 352 (1980), *Arlington Heights v. Metro Housing Corp.,* 429 U.S. 252 (1977), and *United States v. SCRAP, supra,* 412 U.S. 669 (1973), this Court held that parties had standing to sue in order to obtain relief the Court then denied on the merits. Earlier the Court had held explicitly that standing to sue did not require that the cause have merit. *Data Processing Serv. v. Camp,* 397 U.S. 150, 153, n. 5 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970).

The writ should be granted to make it clear, as it apparently is not to this Court of Appeals, that standing to sue is not dependent on the merit of the cause to be decided, and the standing required to sue to preserve the value of personal property and that of real property are the same.

(c) The appellate court coalesced right to sue and right to prevail into a single consideration in order to avoid applying *Russian Volunteer Fleet v. United States, supra,* 282 U.S. 481 (1931), on which we had relied. In that case this Court, reversing the Court of Claims, held that the Due Process Clause of the Fifth Amendment conferred standing to sue on an alien corporation seeking just compensation, even though ordinarily judicial policy would have denied standing because of lack of reciprocity from the foreign government. See also *Wing Wong, et al. v. United States,* 163 U.S. 288 (1896). Those cases mean that due process requires that some forum must be open to enforce an alien's federal claims. California provides no forum open to EMI, but since the rights are claimed under a federal treaty, international law, and the due process and foreign commerce clauses and the first two sources may not confer rights on Capitol, EMI must enforce its rights itself.

The writ should be granted to make it clear that the unanimous decision in *Russian Volunteer Fleet,* supra, 282 U.S. 481, still correctly interprets the Due Process Clause of the Fifth Amendment. Since the first ten amendments all modify the three basic articles, the "case or controversy" provision in Article III, if in conflict, must give way.

Rejection of a parent corporation's right to sue because to grant it standing would disregard the corporate entity, is particularly improper in a case like this one, where the substance of the relief sought is to restrain defendants from disregarding that very corporate entity. There can be no doubt that the parent corporation presents a case or controversy so the decision below must be on policy grounds (*Barrows v. Jackson, supra,* 346 U.S. 249, 255-257 (1953)). We submit that there can be no valid policy which strangles the federal courts so that they cannot hear a parent corporation's complaint that its corporate entity is being ignored to its damage.

(d) International law obligates the United States to provide a forum for the protection and enforcement of treaty rights and other rights which international law recognizes. See Restatement of the Foreign Relations Law of the United States (Draft Revision), Sec. 711, comment a; Sec. 713, comment a. The Court of Appeals disposed of this point by stating that petitioner had no such rights to enforce. Again the court confused standing to sue and standing to win, contrary to clear, contrary decisions of this Court, which apparently need restating.

For the foregoing reasons, the writ should be granted.

2. The merits of petitioner's case are based on (1) the international custom consistently applied both in bi-lateral treaties and independently of them that a foreign corporation not doing business in a taxing country is not taxable by that country on any of its income, (2) the international custom observed by both treaty and non-treaty countries of calculating the taxable income of a taxable subsidiary by the arm's length method and not by an apportionment formula, (3) the Foreign Commerce Clause, (4) Due Process Clause, and (5) the United States-United Kingdom Income Tax Convention in effect between 1946 and 1976. Two of these grounds can be relied on by Capitol in the California courts, but it is uncertain whether it can rely on three of them because neither international law nor custom ordinarily limit a nation's taxation of its own nationals, and as a general proposition perhaps not applicable under this treaty the same is ordinarily true of bi-lateral treaties.

Because the briefs below were on the issue of standing to sue and the propriety of the dismissal of the complaint on that ground, the merits of the case were not briefed, the treaty argument was explained but not argued and the Commerce Clause, Due Process Clause and international custom contentions were named but not explained. Yet the Court of Appeals has prejudged the merits of both the treaty and international custom argument, and its decision, if allowed to stand, may be conclusive on those issues not only against petitioner but against Capitol. See *Montana v. United States,* 440 U.S. 147, 163-164, notes 10, 11 (1979). Apparently the court thought, contrary to this Court's decisions discussed above, that only those entitled to win are entitled to sue. Since the Court of Appeals decided two of the contentions on the merits, the merits are also presented.

The Court may wish to grant certiorari for the purpose of deciding the merits, for the following reasons:

(a) In *Container Corporation of America v. Franchise Tax Board*, ... U.S. ....., 77 L.Ed.2d 545 (1983), this Court expressly left open the constitutionality under the Commerce Clause and the "single voice" doctrine of applying the combined unitary formula to a domestic subsidiary and a foreign based parent. See 77 L.Ed.2d at pp. 568, 569, 571, 572 and 573. The Foreign Commerce Clause restriction on taxation enunciated in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), was held inapplicable to domestically owned multinational business groups, but the Court deferred consideration of its effect on a foreign based multinational group until a case involving such a group should be presented.

The question in *Container* was whether the subsidiaries were part of the parent's unitary business. Here the question is in direct reverse; it is whether the business of EMI Limited and that of its non-United States subsidiaries are part of Capitol's unitary business. Capitol does not control them and cannot direct them. It does not receive the benefit of their profits. The question why it should be taxed on any of their profits is entirely different from the *Container* issue and is one expressly left unanswered in that case. This is the case in which the Court may answer it.

(b) The preserved issue is important and needs to be resolved by this Court. Even if the efforts of the Working Group as reported by Secretary Regan to President Reagan should eventually produce consensus state legislation adopting the "water's edge" limitation, (which at this time is

highly conjectural),[4] the problem will remain for judicial solution for all earlier years. Retroactive tax reductions for sixteen years are unlikely to be enacted by any state, and under Article XIII, Section 25 of the California Constitution would be invalid if enacted in California. *In Re Estate of Stanford,* 125 Cal. 112, 54 Pac. 259, 58 Pac. 462 (1893); *Texas Co. v. Los Angeles,* 52 Cal.2d 55, 66, 338 P.2d 440, 446 (1959); *Doctors' Hospital v. Santa Clara,* 150 Cal.App.2d 53, 309 P.2d 501 (1957). Uncertainty over the issue would plague the state courts for years until a case from one of them could reach this Court, and review and decision by this Court in this case can resolve now the issue this Court left open.

(c) This case contains a pending motion for summary judgment on the merits filed by petitioner in the trial court and not reached by it because of the dismissal. It was renewed on the remand and not acted on because the second dismissal order was entered, for lack of standing to sue. This motion is supported by extensive affidavits with no dispute about any material fact. They present a complete record. While this Court would ordinarily not consider reviewing a case where the facts had not been initially determined below, remand to the district court is not necessary to resolve factual disputes. It would serve only a winnowing function, one which the district court on two proceedings before it has refused to accept, producing much delay in the resolution of the real issues, all of which are federal issues susceptible of ultimate resolution only by this Court, and needing early resolution in the interest of international amity.

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[4]Two bills to do so, one supported by Governor Deukmejian, died when the California Legislature adjourned.

(d) The preserved issue is a Commerce Clause issue. There is also a Due Process (Fourteenth Amendment) issue. In both *F. W. Woolworth Co. v. Taxation & Rev. Dept.*, 458 U.S. 354 (1982), and the *Container* case this Court expressed its belief in the ability of top management to be a source of income. In *Woolworth* the abstention of American top management from control over the operations of the British subsidiary led this Court to conclude that none of the subsidiary's net income was attributable to American management and hence the Due Process Clause was violated by treating the British subsidiary and the American parent as unitary. In *Container,* however, this Court found evidence that the management of the American parent did contribute to the success of the foreign subsidiaries and upheld the apportionment of some of their net income to the American parent on that account. Here, though, the management of the parent is in the United Kingdom. If its guidance and supervision produce some of Capitol's income, the source is activities in the United Kingdom. Obviously, income earned in the United Kingdom does not have its source in California, and there is no territorial jurisdiction (Due Process) to support the tax, whether against EMI or Capitol.

(e) The double taxation foreseen in *Japan Line* is present here. The United Kingdom and every host country of the subsidiaries impose an income tax. So does California. Unlike *Container Corp.*, no credit or deduction has been allowed for the foreign tax. California allows neither, as a matter of policy. The United States allows no credit for the foreign taxes because due to its concept of foreign policy it imposes no tax on the incomes of the foreign cor-

porations. Thus there is double taxation without amelioration.

(f) The treaty right petitioner has sued to enforce (see *Russian Volunteer Fleet v. United States,* supra), arises under Article I(2) of the United States-United Kingdom Income Tax Convention of April 16, 1945, which was in effect in these years.[5] That provision states:[6]

> "(2) The present Convention shall also apply to any other *taxes of a substantially similar character imposed by either Contracting Party subsequent to the date of signature of the present Convention* or by the government of any territory to which the present Convention is extended under Article XXI." (Emphasis ours.)

This California tax was imposed by the 1966 amendments which adopted UDITPA (Uniform Division of Income Tax Purposes Act; Rev. and Tax. Code Sections 25120-25140), "subsequent to" the signature of the treaty.

The Court of Appeals thought the term "Contracting Party" did not mean all 51 American governments collectively but only one of them. It is in error.

The term "Contracting Party" is not defined in the treaty. The treaty uses it, however, to include each State of The United States, so any new state tax would be governed by treaty restrictions. Throughout the treaty, where corporations are dealt with, the terms "United States corporation" and "corporation of one Contracting Party" are defined and used to include corporations created by the laws of a

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[5]Other provisions of this treaty were before this Court in *Maximov v. United States,* 373 U.S. 49 (1963).

[6]The relevant text of the treaty is in Appendix D.

state. Article II speaks of such laws as "laws of the United States," and of "one Contracting Party."

The texts of these definitions are:

Article II .....

> "(d) The term 'United States corporation' means a corporation, association or other like entity created or organized in or under the laws of the United States.
>
> • • •
>
> "(f) The terms 'corporation of one Contracting Party' and 'corporation of the other Contracting Party' means a United States corporation or a United Kingdom corporation as the context requires.
>
> • • •

Since nearly all American commercial and manufacturing corporations are formed under state law, the treaty clearly regards such corporations as "organized under the laws of the United States," and as "corporation(s) of one Contracting Party."

Article III of the treaty (Appendix D, *infra*) requires the use of the arm's length method and does not permit the use of a formula in allocating income to source. It also provides that neither Contracting Party shall tax a corporation of the other Contracting Party if the corporation does not have a "permanent establishment" within the taxing Party, and then provides:

> "the fact that a corporation of one Contracting Party (here Petitioner) has a subsidiary corporation which is a corporation of the other Contracting Party (here Capitol) • • • • shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation."

Since Capitol, formed under the laws of California, is a "corporation of one Contracting Party", the treaty regards the laws of a state as the laws of a Contracting Party.

That meaning is necessary to impart any significance to Article XXI of the Treaty, which, as the Court of Appeals acknowledged, forbids state as well as federal taxation which discriminates against an American subsidiary of a British parent. (Op. footnote 3.) What the Court of Appeals did not observe is that unless Capitol is a "corporation of one of the Contracting Parties" the discrimination prohibited by subsection (3) could be practiced against it by a state with impunity, and the same would be true of a Delaware, Nevada, New Jersey or Illinois corporation. Only if such corporations are "corporation(s) of one of the Contracting Parties" is a discriminatory state tax prohibited. Necessarily state incorporated corporations are meant to be "corporations of one of the Contracting Parties." As we have shown above, Article II defines that term to mean a "United States corporation", and also defines that term to be "a corporation . . . created or organized in or under the laws of the United States."

The enclosing circle of logic showing that state laws are "laws of the United States" and a state corporation is a "corporation of one Contracting Party" is complete. It follows that a new tax "imposed by either Contracting Party" includes a new state tax.

We are aware of this Court's dictum in *Container Corp. v. Franchise Tax Board,* ..... U.S. ....., 77 L.Ed.2d at 573, *supra,* that "none of the tax treaties into which the United States has entered covers the taxing activities of . . . States." As we have shown that dictum cannot encompass the U.S.-

U.K. treaty, Article XII(5) of which is specific that it does cover the taxing activities of States. The Court also referred on the same page to the action of a minority of the Senate in blocking an even more explicit prohibition in the successor treaty.

The membership of the Senate was different in 1945 than it was in 1978. It is different today from what it was in 1978. Several senators in the disapproving minority are no longer in the Senate. Many senators voted against the treaty even when the state tax restriction was removed, thereby showing that was not what they had objected to. It is thus treacherous to gauge the sense of the Senate in 1945 from what transpired in 1978.

The current treaty is much more clearly drafted. The 1945 treaty requires close analysis for American eyes, but for British eyes unaccustomed to viewing matters from a federal perspective, the suggestion that the treaty should be read as binding only one of the 51 governments comprising the United States of America[7] must have come as quite a shock. Undoubtedly it stimulated them to insist on a more clearly stated restriction than had seemed necessary before some states began applying the unitary formula to include foreign parent corporations.

A bi-lateral treaty is a contract between two nations (called States in international practice), and intended to be clear to both. This sometimes is not the case, as is shown by *United States v. Percheman*, 7 Pet. (32 U.S.) 51, 87 (1833), where this Court overruled an earlier decision of its own after reading an accredited translation of the Span-

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[7]The preamble to the Constitution states that that is the name of the nation it formed.

ish language version of the Florida Cession Treaty. The Court concluded that reading the English language version alone distorted the intended meaning.

(g) Petitioner, a friendly alien corporation, also contends that under international custom so widely accepted that it has become international law, its income cannot be taxed either to it or to its subsidiary, by the State of California, and that State must conform to the arm's length method in determining the subsidiary's income.

(1.) Internationally accepted custom is one source of international law. Sec. 38(1), Statute of the International Court of Justice (Chap. 14, United Nations Charter); Sec. 36, Statute of the World Court; *Sears v. The Scotia,* 14 Wall. (81 U.S.) 170 (1872); *The Paquete Habana,* 175 U.S. 677 (1900); Restatement of the Foreign Relations Law of the United States, Second, Sec. 1, Comment C. As international law, it is equal in authority to law made by international agreement. Restatement (Revised) Sec. 134, Comment D. Every one of the 33 treaties on the subject in force, every one negotiated and awaiting ratification, and every model treaty both of this Government and of the United Nations and of other international agencies, provides for use of the arms length method of allocating income to source, not a formula. International practice is to use it between countries without bi-lateral tax treaties.

In *Sears v. The Scotia,* supra, 14 Wall. (81 U.S.) 170 (1872), in the absence of treaties, this Court found that thirty countries had unilaterally adopted regulations giving sailing vessels the right of way over steamships, and held that they established international custom which was international law. Here the international custom is established by thirty-three bilateral treaties, general acceptance

of the same rule by non-treaty nations, and by model treaties of the United Nations. There is then an even broader base for finding the existence of an international custom than there was in *The Scotia*. That case was followed in *The Paquete Habana*, 175 U.S. 677 (1900).

Moreover, the United Nations Charter, which is a treaty the United States has signed and ratified, declares that "international custom, as evidence of a general practice accepted as law" is "international law" the International Court of Justice is to recognize and apply. Article 38(1) of Chapter 14 (printed in Appendix E).

(2.) Since international custom which has become international law is the law of the United States governing both federal courts (*The Paquete Habana*, supra, and *Sears v. The Scotia*, supra) and federal executive agencies (*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)), it is the Supreme Law of the land, binding the states. Art. VI, Sec. 2; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-427 (1974). We contend that the firmly established international custom whereby income of a foreign corporation not having a permanent establishment in the taxing jurisdiction is not taxable by it, even if the foreign corporation has a subsidiary there, is binding on the states, as is the inflexible refusal of international custom to permit a formula to be used to determine the taxable income of the subsidiary.

This Court has in the past been sensitive to the damage to our foreign relations which state interference can produce, and has excluded the states from acting in that area. In *Japan Line Ltd. v. County of Los Angeles, supra*, 441 U.S. 434 (1979) a property tax apportioned to tax only the

percentage of value related to the period Japanese owned containers were in the county was held an unconstitutional departure from international custom. In *Zschernig v. Miller,* 389 U.S. 429 (1968), this Court held that an Oregon probate code section requiring proof of reciprocity as a condition to inheritance by an alien was an unconstitutional intrusion into foreign affairs. It is notable that the Court reached this conclusion even though the Solicitor General filed a brief stating that the Oregon statute did not "unduly" interfere with "the United States conduct of foreign relations." 389 U.S. at 434, 443.

Moreover, international custom as embodied in the bilateral tax treaties is to avoid double taxation of income of foreign owned multinational businesses. *Maximov v. United States,* 373 U.S. 49, 54 (1963) recognized that this very treaty did so. While this Court held in *Container Corporation* that the international community cannot properly be concerned with how or how many times the United States and its political subdivisions tax the income of American owned businesses, it can rightfully be and is concerned with duplicating taxation of foreign owned income. The custom which has developed is to avoid it either by credit or abstention. California, however, would do neither, even though EMI and each of its subsidiaries has paid income tax to its home country on all its income. The United States cannot avoid its responsibility to other nations to conform to the international custom by subdividing its governmental functions between itself and political subdivisions and permitting the latter to support themselves by taxing foreign source income the paramount power has agreed not to tax. There is only one government in the United States having international recognition, and it is responsible to other

nations for the conduct of its political subdivisions, including their ways of financing their governmental functions.

This tax area is a "highly charged" area (cf. *McCulloch v. Sociedad Nacional de Marineros de Honduras,* supra, 372 U.S. 10, 21) of international relations. As the Court has been told in prior cases, the Commission of the European Economic Community has filed four separate protests against this state practice, the Government of the United Kingdom has delivered diplomatic notes to our government protesting it on at least three occasions, and protests have also been lodged by the Governments of Canada, Japan and The Netherlands. We are informed that the latter has refused to continue negotiation of a new Income Tax Convention until a prohibition of this state practice is included in it. The outcry by foreign governments protesting the possibility that this Court's decision in *Container Corp. v. Franchise Tax Board,* supra, might be applicable to parent corporations formed in their own countries has been entirely unprecedented in the realm of international taxation. The President's appointment of the Working Group defused this international controversy temporarily but the falling apart of the hoped for consensus and the failure of the California legislature to approve corrective legislation have re-ignited it. Moreover, any voluntary state amendments which the foreign outcry may produce cannot be retroactive in California, *(Estate of Stanford,* supra) and probably will not be so elsewhere. Hence the issue will remain for decision by this Court in any event, and early disposition of it, particularly if it is the disposition suggested by *Japan Line Ltd. v. County of Los Angeles,* supra, will undoubtedly speed the acceptance and implementation by the states of the solution to the foreign relations and foreign

commerce problem suggested by the Chairman of the Working Group.

The foreign retaliation foreseen in *Japan Lines* is an imminent threat. Some 200 members of the House of Commons have introduced a retaliatory bill, and the Government of the United Kingdom has put off a vote on it only until July, 1985, in order to give this country more time to solve this international dispute itself.[8] In view of the four-times repeated denunciation of the combined unitary formula by the Commission of the European Economic Community we may expect action from its other members. Japan has taken its own measures, through industrial action in boycotting California and other unitary states in the placement of new assembly plants or enlargement of existing ones, and some formerly unitary states, such as Oregon, have embraced the waters' edge principle expressly to attract foreign owned factories. Once again, as in the disastrous days of the Articles of Confederation, we see states tailoring foreign economic policy for their own, not for national, purposes. The selective foreign retaliation is carving the United States into segments, in default of an authoritative position by the "one voice."

(3.) We believe it would be helpful for the Court to view the problem presented here from the vantage of the government whose laws created and govern the petitioner, that of the United Kingdom.

The United Kingdom is a sovereign government vis-à-vis other national governments. It has *attempted* to deal with

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[8]24 Tax Notes (No. 13), pp. 1219-1220, quoting Mr. J. D. Taylor Thompson, Commissioner and Undersecretary of Inland Revenue (United Kingdom).

the United States of America, also a sovereign national government. The executives of the two countries negotiated and signed an income tax convention, which is a treaty, in 1976 which contained in its Article 9(4) a provision specifically intended to deal with the problem confronted by the petitioner, and now this Court. The remedial provision of the treaty was removed when the United States Senate, in a vote 2 short of the two-thirds required by the Constitution (yet a majority) failed to ratify the treaty, under the assertion of some of the dissenters that the provision intruded on "states' rights".

Remedial legislation has been introduced in Congress in each of the last ten sessions. Each bill has been challenged as restricting "states' rights" and none has been enacted.

Just what is the "states' right" involved in this dispute? The states, including California, are "sovereign" only vis-à-vis one another. They are not sovereign national governments, and the conduct of foreign affairs is specifically denied them by the Constitution. If the states have any "rights" in this dispute with foreign governments, they either must be sovereign rights susceptible to negotiation by each state with every national government, including the United Kingdom, or they can only be "rights" to the extent they are *positively* asserted by the sovereign national government of the United States in the conduct of its foreign relations with the United Kingdom, e.g., Treaty of Arbitration with Canada in 1871 to settle rights to the San Juan Islands claimed by Washington.

If this Court, which is one of the three arms of the national sovereign government, refuses to address the very real, immediate, and controversial issues presented here, to

what course must the United Kingdom turn to protect the very real, immediate and actual rights of the petitioner? Should it seek to exchange ambassadors with the State of California, or perhaps the Multi-State Tax Commission, to negotiate over this matter of "states rights"? And if negotiations fail, should the United Kingdom sail its warships into San Francisco Bay as a display of naked force against an intractable government operating outside of international law?

Certainly, the problem facing the United Kingdom, seeking some forum in which the rights of its corporate creation, EMI Limited, may be addressed, is real. Two of the three branches of the national sovereign have been closed by "states' rights". Similar avenues in state governments may not be explored because of the United States Constitution. State courts are closed to the petitioner by state rules. The only governmental channel for recourse remaining is the federal courts and this Court offers the only remaining avenue open for redress of the rights of the petitioner, a United Kingdom corporation.

The writ should therefore be granted on the merits of this case, to determine (1) whether the refusal of California to heed the "single voice" doctrine in taxing the net income of a foreign owned and based multinational group is a forbidden burden on foreign commerce, (2) whether international custom that a formula cannot be used and the arm's length method must be used in determining the net income of the American subsidiary of a foreign multinational group is International Law binding on the states as the Supreme Law of the land, (3) whether under the Due Process Clause any net income attributable to the

parent's top management's supervisory role can be apportioned to an American state for taxation when that top management is located in and functions from the United Kingdom, and (4) whether the United States-United Kingdom Income Tax Convention, adopted in 1945 and in effect in the taxable years applies to limit not only federal taxes but also new state taxes first "imposed" after signature of the Convention.

CONCLUSION

The writ of certiorari should be granted on the issue of standing to sue and on the merits.

Respectfully submitted,

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October , 1984.

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 82-4611
DC No. CV 79-2146

EMI Limited,
Plaintiff-Appellant,

vs.

William Bennett, Kenneth Cory,
Mary Ann Graves, and
Gerald H. Goldberg,
Defendants-Appellees.

[Filed July 23, 1984]

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted May 15, 1984

OPINION

Before: ANDERSON, SKOPIL, and POOLE, Circuit Judges

SKOPIL, Circuit Judge:

The district court dismissed this action on the ground that EMI, Limited ("EMI") lacked standing. *EMI Ltd. v. Bennett,* 560 F.Supp. 134, 135-36 (N.D. Cal. 1982). We affirm.

FACTS AND PROCEEDINGS BELOW

Capitol Industries-EMI, Inc. ("Capitol"), is a Delaware corporation with its principal place of business in California. Capitol is in the business of recording phonograph records and tapes. Capitol's business is conducted almost exclusively in the United States.

EMI, a United Kingdom corporation, owns the majority of the stock of Capitol. EMI owns a group of subsidiaries, most of which operate outside the United Kingdom. EMI, through its subsidiaries other than Capitol, is engaged in the same business as Capitol, but primarily in markets other than in the United States. In addition, EMI and its foreign subsidiaries, other than Capitol, are engaged in businesses unrelated to the recording industry.

Capitol pays both federal and California state income taxes. Neither EMI nor its subsidiaries, other than Capitol, pay income taxes to the United States or any individual state. However, EMI and its other subsidiaries have paid taxes in their respective home countries.

The Franchise Tax Board, State of California ("FTB"), contends that California law requires a combined tax report from a taxpayer that covers all commonly owned or controlled corporations that are engaged in a "unitary" business. The FTB has determined that Capitol, EMI and other EMI subsidiaries are engaged in a single or "unitary" business to the extent of their "music activities." Therefore, the FTB proposed to assess against Capitol an additional tax liability based on the state's "unitary method" of taxation.

Application of the unitary scheme under California law involves combining the net incomes of Capitol, EMI, and all of EMI's other subsidiaries, derived from the music portion of their businesses. That combined income is then apportioned between California and the rest of the world based on a formula using the California ratio of property, payroll, and sales, to the world-wide figures for the same factors. *See* Cal. Rev. & Tax. Code §§ 25101, and 25128-36.

In the course of the FTB's investigation of Capitol, it demanded that EMI provide certain business records relating to EMI and its subsidiaries. EMI refused. EMI argued that, under the Official Secrets Act of the United Kingdom, some of the information, related to military contracts entered into by EMI and the British government, is not disclosable under the law of the United Kingdom. EMI refused to provide other information on the grounds that it either lacked access to such information, or because California lacks jurisdiction over EMI and its non-United States subsidiaries. The FTB then dropped its demands for information from EMI. It shifted its demand to Capitol, asking Capitol for the same information it had sought from EMI. Capitol claimed it did not have the requested information and that EMI would not provide it the information. The FTB's unitary assessment was therefore made on the basis of estimated figures available from various public sources.

Capitol filed an action in district court against several persons individually and as members of the FTB. Capitol sought injunctive and declaratory relief to prevent the proposed assessment. Capitol argued that unitary treatment of its business and that of EMI and other EMI subsidiaries violated California law and the Foreign Commerce Clause of the United States Constitution, Art. I, Sec. 8, Clause 3.

EMI filed a separate action in federal court against the same defendants and asserting the same claims as Capitol. Additionally, EMI alleged that the proposed assessment on its subsidiary Capitol would negatively affect its stock holdings in Capitol. Both EMI and Capitol also sought

relief from the FTB's demand that Capitol provide certain records of EMI and its foreign subsidiaries.

Cross-motions for summary judgment were filed. The district court denied Capitol's and EMI's motions and granted the Board Members' motions on the ground that the Anti-Injunction Act precluded subject matter jurisdiction because a "plain, speedy and efficient" state court remedy existed for the claims asserted by Capitol and EMI. 28 U.S.C. § 1341.

On appeal, this court held that the action by Capitol should be dismissed because Capitol had an adequate remedy under state law.[1] *Capitol Industries-EMI, Inc. v. Bennett,* 681 F.2d 1107, 1118 (9th Cir.), *cert. denied,* 455 U.S. 943 (1982). The action brought by EMI, however, was remanded for further proceedings. The administrative procedures and refund suit provided by California law are remedies available only to taxpayers. Since only Capitol, and not EMI, is a taxpayer, EMI has no method under state law to challenge tax assessments. This court held that 28 U.S.C. § 1341 was no bar, but questioned whether EMI had standing to challenge a tax assessment against its subsidiary, Capitol. *Id.* at 1119 n.3. The court chose not to rule on that issue and remanded to the district court for its consideration.

After remand the defendants moved to dismiss for lack of standing. The district court held that EMI was without

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[1]Some time after the district court's decision, the assessment against Capitol became final. Capitol then appealed to the California State Board of Equalization. The FTB cannot take steps to enforce the collection of the assessed tax while the appeal is pending before the Board of Equalization. At the time of this writing, Capitol's administrative appeal was still pending.

standing to challenge the tax against Capitol. *EMI Ltd.*, 560 F.Supp. at 135-36. EMI appealed.

DISCUSSION

1. Standard of Review.

Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Joyner v. Mofford*, 706 F.2d 1523, 1526 (9th Cir.) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)), *cert. denied*, 104 S.Ct. 509 (1983). Because standing is a jurisdictional question, this court reviews *de novo*. *E.g.*, *Societe de Conditionnement v. Hunter Engineering*, 655 F.2d 938, 941 (9th Cir. 1981).

2. Merits.

Courts require a plaintiff to have a "personal stake" in the outcome of a case "to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Joyner*, 706 F.2d at 1526 (*quoting Warth*, 422 U.S. at 498-99) (emphasis in original). To have such a "personal stake," a plaintiff must allege a "distinct and palpable injury to himself." *Joyner*, 706 F.2d at 1526 (*quoting Warth*, 422 U.S. at 501). "[W]hen a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III [United States Constitution] limitation." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

The essence of EMI's argument is that it is injured by the tax assessed (but not yet collected) against Capitol. As EMI states it, "[t]his case is one to restrain [the FTB] from demanding of EMI [either directly or through Capitol], information it is prohibited by British law from revealing, from lessening the value of EMI's property in United States through the assertion of unconstitutional taxes from Capitol, and from burdening EMI's foreign commerce with the United States."

Despite EMI's attempts to characterize itself as a prime participant, its only real connection to the live controversy is in its status as majority shareholder of Capitol stock. The FTB is making demands for information only from Capitol. If Capitol fails to produce the information because of EMI's recalcitrance the result will be, at worst, either an increase in Capitol's tax liability or a tax penalty. Whether through the imposition on Capitol of taxes or the increase in taxes because of Capitol's failure to produce information, EMI's only possible injury is the dimunition in value of its holdings in Capitol.

Generally, a shareholder does not have standing to redress an injury to the corporation in which it holds stock. *Shell Petroleum, N.V. v. Graves,* 709 F.2d 593, 595 (9th Cir.), *cert. denied,* 104 S.Ct. 537 (1983); *Sherman v. British Leyland Motors, Ltd.,* 601 F.2d 429, 439-40 (9th Cir. 1979) (sole shareholder had no standing to assert either federal or state law claims); *Von Brimer v. Whirlpool Corp.,* 536 F.2d 838, 846 (9th Cir. 1976) (majority shareholder may not assert state law claims despite economic injury to him); *Erlich v. Glasner,* 418 F.2d 226 (9th Cir. 1969) (sole shareholder could not maintain an action under 42 U.S.C. § 1983).

> To have standing to maintain an action, a shareholder must assert more than personal economic injury resulting from a wrong to the corporation. *Von Brimer v. Whirlpool*, 536 F.2d at 846. A shareholder must be injured directly and independently of the corporation. *Id.*; *Erlich v. Glasner*, 418 F.2d at 228.

Graves, 709 F.2d at 595.

This case is controlled by *Graves*. The facts in *Graves* are nearly identical to those presented here. Shell Petroleum, a Netherlands corporation, is the majority shareholder in both Shell Oil and Scallop Holding, Inc., which in turn owns Scallop Nuclear. Both Shell Oil and Scallop Nuclear are Delaware corporations doing business in California. The FTB proposed unitary tax treatment for Shell Oil and Scallop Nuclear and their parent corporations. In the process, the FTB demanded information concerning the worldwide operations of Shell Petroleum from Shell Oil and Scallop Nuclear. Shell Petroleum contested the application of the unitary tax and the demand for information from its subsidiaries. The district court held that Shell Petroleum had no standing, and this court affirmed. *Graves*, 709 F.2d at 595-96. The court found that the unitary method of taxation did not harm Shell Petroleum directly or independently of the harm to its subsidiaries. It was therefore without standing under the general rule that shareholders are without standing to assert the rights of the corporation in which they have ownership. *Id.*

EMI attempts to distinguish *Graves* on several grounds. First, EMI argues that "the substance of [its] complaint is that it wants its corporate entity observed, and wants the corporate entity of its subsidiary, Capitol, also observed." EMI argues that a similar demand was not a part of the

complaint by Shell Petroleum. EMI's argument is without merit. While Shell Petroleum may not have said so in so many words, it is clear that it was objecting to the unitary tax which does, to an extent, blur corporate identities. EMI's argument goes to the legality of California's unitary tax method which, despite the fact it blurs corporate identities, has been recently upheld. *See Container Corp. v. Franchise Tax Board,* ..... U.S. ....., 103 S.Ct. 2933 (1983).[2]

The general rule of no standing for stockholders does observe lines of corporate identity and is, in fact, based on the concept of distinct corporate identities. In order for EMI to prevail it would have to argue that the court should observe corporate identities for purposes of its argument against the unitary tax, but ignore corporate identities for purposes of its argument against the general rule of no standing for stockholders. A decision by the court in favor of EMI would be contrary to the cases upholding the unitary tax method and also contrary to the cases establishing the general rule of no stockholder standing.

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[2]*Container Corp v. Franchise Tax Board,* ... U.S. ... , 103 S.Ct. 2933 (1983) made clear that the blurring of corporate identities for purposes of unitary taxing was permissible. 103 S.Ct. at 2941. *See also Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 440-41 (1980)(same). It is true that *Container Corp.* is distinguishable from this case in that *Container Corp.* involved a domestic parent corporation with foreign subsidiaries, while this case involves a foreign parent corporation with domestic (as well as foreign) subsidiaries. While that distinction may make a difference with respect to other questions decided in *Container Corp.*, for purposes of ignoring corporate identities, that distinction makes no difference.

Second, EMI attempts to distinguish *Graves* by arguing that here, a treaty between the United States and Great Britain gives EMI standing. In *Graves,* Shell Petroleum argued that a treaty between the United States and the Netherlands provided for standing. This court held that it did not. *Graves,* 709 F.2d at 596. EMI argues the treaty between the United States and Great Britain differs significantly from the treaty between the United States and the Netherlands. If EMI's interpretation of the treaty is correct, it might well have standing. A cause of action may be specifically granted to a shareholder distinct from the corporation by a treaty provision. *Graves,* 709 F.2d at 595; *Harmsen v. Smith,* 542 F.2d 496, 499-500 (9th Cir. 1976).

The treaty relied upon by EMI does not specifically, or even implicitly, grant special status to stockholders in respect to the corporations in which they have ownership. *See* United States-United Kingdom Income Tax Convention of 1946, 60 Stat. 1377-97 (June 26, 1946). Moreover, the treaty by its explicit terms does not even cover taxes imposed by a state:[3]

ARTICLE I

(1) The taxes which are the subject of the present Convention are:

(a) In the United States of America: The Federal income taxes, including surtaxes and excess

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[3]The treaty does mention state taxes in Article XXI, but specifically limits the reference to state taxes for purposes of that section. Article XXI prohibits discrimination in federal, state, or municipal taxation of foreign corporations. There is no claim in this case that the FTB is applying the unitary method of taxation to foreign corporations differently than domestic ones.

profits taxes (hereinafter referred to as United States tax)

(b) In the United Kingdom of Great Britain and Northern Ireland: The income tax (including surtax), the excess profits tax and the national defense contribution (hereinafter referred to as United Kingdom tax).

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequently to the date of signature of the present Convention or by the government of any territory to which the present Convention is extended under Article XXII.

The contracting parties to the tax treaty are the federal governments of the United States and the United Kingdom. Art. XXII referred to in Art. I, Sec. 2, does not include individual states within the meaning of "territory."

EMI makes three other arguments, none of which have merit. It argues that an alien corporation is entitled to the protection of the fifth amendment. That argument has no application in this case. The question is not whether an alien has standing, but whether a stockholder has standing to act for the corporation. EMI also argues that, under international law, "if a country confers rights on a foreign national, it is obligated to provide a judicial tribunal to enforce those rights." Again, the argument does not fit the facts of the case. This country has conferred no special rights on EMI. The nondiscriminatory application of rules of standing eliminate EMI as a plaintiff in this tax matter involving its subsidiary, Capitol.

Finally, EMI argues that unless it has standing, important questions reserved by the Supreme Court in *Container Corp.* will be rendered essentially unreviewable. *Container Corp.* was the mirror image of this case. It involved reaching foreign subsidiaries of a domestic parent corporation, whereas this case involves reaching the foreign parent of domestic subsidiaries. The Court specifically limited its decision to the factual circumstances presented. *Container Corp.*, 103 S.Ct. at 2952 n.26. EMI is plainly wrong that the questions reserved will never reach the Court unless EMI is granted standing. The factual context presented by this case could reach the Supreme Court the same way that *Container Corp.* did, by appeal through the California courts. Capitol is best suited to assert rights that are distinctly its own.

The district court is AFFIRMED.

Appendix B

Judicial Code Sections. (Title 28)

Section 1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Section 2202.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USC § 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Appendix C

United States Constitution:

Article I, § 8, Cl. 3.

Power of Congress to regulate Commerce.

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Art I, Sec. 10, Cl 2

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Sec. 1,

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law

Appendix D

Relevant Sections, United States-United Kingdom Income Tax Convention of 1945.

Article I.

(1) The taxes which are subject of the present Convention are:

(a) In the case of the United States of America: the Federal income taxes, including surtaxes (hereinafter referred to as 'United States tax');

(b) In the case of the United Kingdom of Great Britain and Northern Ireland: The income tax (including surtax), the corporation tax, and the capital gains tax (hereinafter referred to as 'United Kingdom tax').

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequent to the date of signature of the present Convention by the government of any territory to which the present Convention is extended under Article XXII."

Article II.

(1) In the present Convention, unless the context otherwise requires:

(a) The term "United States" means the United States of America, and when used in a geographical sense means the States, the Territories of Alaska and of Hawaii and the District of Columbia.

(b) The term "United Kingdom" means Great Britain and Northern Ireland, excluding the Channel Islands and the Isle of Man.

(c) The terms "territory of one of the Contracting Parties" and "territory of the other Contracting Party" mean the United States or the United Kingdom as the context requires.

(d) The term "United States corporation" means a corporation, association or other like entity created or organized in or under the laws of the United States.

(e) The term "United Kingdom corporation" means any kind of juridical person created under the laws of the United Kingdom.

(f) The terms "corporation of one Contracting Party" and "corporation of the other Contracting Party" mean a United States corporation or a United Kingdom corporation as the context requires.

(g) The term "resident of the United Kingdom" means any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax. A corporation is to be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom.

(h) The term "resident of the United States" means any individual who is resident in the United States for the purpose of United States tax and not resident in the United Kingdom for the purposes of United Kingdom tax, and any United States corporation and any partnership created or organized in or under the laws of the United States, being a corporation or partnership which is not resident in the United Kingdom for the purposes of United Kingdom tax.

(i) The term "United Kingdom enterprise" means an industrial or commercial enterprise or undertaking carried on by a resident of the United Kingdom.

(j) The term "United States enterprise" means an industrial or commercial enterprise or undertaking carried on by a resident of the United States.

(k) The terms "enterprise of one of the Contracting Parties" and "enterprise of the other Contracting Party" mean a United States enterprise or a United Kingdom enterprise, as the context requires.

(l) The term "permanent establishment" when used with respect to an enterprise of one of the contracting Parties means a branch, management, factory or other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf. An enterprise of one of the Contracting Parties shall not be deemed to have a permanent establishment in the territory of the other Contracting Party merely because it carries on business dealings in the territory of such other Contracting Party through a *bona fide* commission agent, broker or custodian acting in the ordinary course of his business as such. The fact that an enterprise of one of the Contracting Parties maintains in the territory of the other Contracting Party a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute such fixed place of business a permanent establishment of such enterprise. The fact that a corporation of one

Contracting Party has a subsidiary corporation which is a corporation of the other Contracting Party or which is engaged in trade or business in the territory of such other Contracting Party (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation.

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Article III.

(1) Industrial or commercial profits of an enterprise of one of the Contracting Parties shall be exempt from tax by the other Party unless the enterprise is engaged in trade or business in the territory of such other Party through a permanent establishment situated therein. If such enterprise is so engaged, tax may be imposed by such Party on the industrial or commercial profits of the enterprise but only on so much of them as are directly or indirectly attributable to the permanent establishment.

(2) Where an enterprise of one of the Contracting Parties is engaged in trade or business in the territory of the other Contracting Party through a permanent establishment situated therein, there shall be attributed to such permanent establishment the industrial or commercial profis which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.

Article XXI

(1) A national of one of the Contracting Parties who is resident in the territory of the other Contracting Party shall not be subjected in that other Contracting Party to more burdensome taxes than is a national of that other Contracting Party who is resident therein.

(2) A permanent establishment which an enterprise of one of the Contracting Parties has in the other Contracting Party shall not be subject in that other Contracting Party to more burdensome taxes than is an enterprise of that other Contracting Party carrying on the same activities. This paragraph shall not be construed as obliging either Contracting Party to grant to residents of the other Contracting Party any personal allowances or deductions which are by its law available only to residents of that former Contracting Party, nor as restricting the right of either Contracting Party to tax in accordance with paragraph (1) or paragraph (2) of Article VI dividends paid to a permanent establishment maintained within its territory by a resident of the other Contracting Party.

(3) A corporation of one of the Contracting Parties, the capital of which is wholly or partly owned by one or more nationals or corporations of the other Contracting Party, shall not be subjected in the former Contracting Party to more burdensome taxes than is a corporation of the former Contracting Party, the capital of which is wholly owned by one or more nationals or corporations of that former Contracting Party.

(4) The term "nationals" as used in this Article means

(a) in relation to the United Kingdom, all British subjects and British protected persons (being individuals), from the United Kingdom or any territory with respect to which the present Convention is applicable by reason of extension made by the United Kingdom under Article XXII; and

(b) in relation to the United States, United States citizens, and all individuals under the protection of the United States, from the United States or any territory to which the present Convention is applicable by reason of extension made by the United States under Article XXII.

(5) In this Article the word "taxes" means taxes of every kind or description, whether national, Federal, state, provincial or municipal.

Appendix E

Article 38(1), Ch. 14, Charter of The United Nations: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.